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Peter Mart Jorgensen v. Ranghild V. Jorgensen : Brief of Defendant and Appellant

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

PETER MART JORGENSEN,
Plaintiff and Respondent,

vs.

RANGHILD V. JORGENSEN,
Defendant and Appellant.

Case No. 8618

BRIEF OF DEFENDANT AND APPELLANT

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SUBJECT INDEX

INDEX OF AUTHORITIES

TEXTS

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STATEMENT OF FACTS

The plaintiff and defendant were born in Denmark and were acquainted with one another before immigrating to America. The defendant arrived in this country about seven months after the plaintiff. They were married in Salt Lake City, Utah on May 6, 1922. (R. 14) There are two children issue of the marriage, both of whom are of age and married. (R. 14)

The plaintiff is a florist by trade. In 1932 he started in business for himself. In addition to her household duties the defendant worked in the business with him, confining her efforts mostly to the retail part of it. (R. 54, 55) In 1949 they took over the Hyland Floral on a lease from one John Quist, which they operated as a partnership. (R.

17) The defendant continued to work in the business with the plaintiff until December 10, 1955, when he ordered her off the business premises. (R. 56, 95) Both parties worked diligently, whereby they acquired fixed assets of a considerable value and also derived a substantial income from the operation of the Hyland Floral business (R. 176-183, 35 — 40).

The parties experienced no marital difficulty until 1938 or '39, when they had trouble over the plaintiff's attentions to a Mrs. Rigmor Tronier. (R. 57, 97) This storm blew over and they lived a happy married life until plaintiff became interested in one Marie Antoinette Nielson in 1953 while the defendant was on a trip to Denmark. (R. 59). Defendant first learned of this situation in November of 1954. (R. 63, 102). Although she had observed a change in plaintiff's attitude toward her. (R. 98, 99) Attempts at reconciliation were unsuccessful. (R. 110)

On or about August 30, 1955, the plaintiff refused to permit the defendant to continue to participate in the affairs of the floral business and commenced an action for divorce. (R. 129, 130) Defendant didn't want a divorce (R. 106, 109, 110), but when the action was commenced, counterclaimed and as a result of the trial she was granted the divorce. The court made disposition of some of the pro-

perty of the parties and entered its decree with respect to other property interests.

STATEMENT OF POINTS

POINT I.

THE DECREE IS INDEFINITE AND DOES NOT ADJUDICATE THE PROPERTY RIGHTS OF THE PARTIES.

POINT II.

THE DECREE DOES NOT MAKE AN EQUITABLE DISTRIBUTION OF THE PROPERTY BETWEEN THE PARTIES.

ARGUMENT

POINT I.

THE DECREE IS INDEFINITE AND DOES NOT ADJUDICATE THE PROPERTY RIGHTS OF THE PARTIES.

At the outset should be kept in mind that the parties were actually partners in the operation of the Hyland Floral business and even though the defendant does not wish to continue in this business relationship with plaintiff (R. 127, 128, 129), the court requires her to do so against her will. Although a partner, the decree gives her no right in the control or management of the business. Paragraph 2 is quoted as follows (R. 206):

> "That until the further order of the court the partnership existing between the parties known as Hyland Floral be and the same hereby is continued, the plaintiff, nevertheless, to receive the sum of $500.00 per month from the partnership business as a management fee in connection therewith, the

same to be paid before the net partnership earnings are determined between the plaintiff and defendant, which net earnings shall be divided and paid over to the parties on or before the expiration of sixty days from the close of each annual accounting period, the net earnings to be after repayment of all advances and borrowings incident to the partnership or appropriate reserves for the same; that said partnership, until otherwise ordered by the court, shall be managed and operated by the plaintiff, and during such time the defendant shall have no active part in the management thereof and she hereby is restrained from interfering with said business and competing in the same line of business on her own account or with others; that the defendant shall have access at all reasonable times to the books and records of said partnership for the purpose of inspection."

The foregoing provisions give the exclusive management of the business to the plaintiff and he receives $500.00 per month from the partnership as compensation. In her counterclaim the defendant asks for a dissolution of the partnership and an accounting of the property and assets. The evidence of defendant's drinking, Exhibit 2D (R. 100, 133), his using the partnership funds to purchase uranium stock (R. 43, 96) and his personal conduct, was not such as to inspire confidence in his ability to operate the business, which in the past has been successfully operated by the family as a unit. Can the defendant be blamed if she no longer

desires to be associated with the plaintiff even as a limited partner? These parties have enjoyed a successful marriage and together have raised their children. She didn't want this divorce. Attempts to reconcile their differences (R. 110) were futile. On two occasions she humbled herself and went to the plaintiff and asked him to consider the matter and come back home (R. 133). He refused even to discuss the matter.

Why compel the defendant to continue in a partnership relation with plaintiff after the marriage relation is dissolved? Does such a requirement constitute a disposition of the property belonging to the parties? Why compel the defendant to assume the responsibility of checking books and records of the partnership to make sure that the business is being properly managed? That is to say, that the business is operated in a businesslike manner and that proper reserves are being laid aside, that proper repairs and replacements are being made? Why compel the defendant to assume any responsibility with respect to the operation of said business, in her own interest, by permitting the business to be continued under the management of the plaintiff "until the further order of the court." We submit that the court has no authority and no jurisdiction in the first instance to enter any decree except one which definitely disposes of the property

by a definite distribution between the parties. He is not authorized to enter a decree under which for an indefinite period plaintiff shall receive $500.00 per month and whereby the court presides over the destinies of the parties, reserving unto himself the power to alter or change their relations with respect to their property as he may at some future time see fit. What future conditions will prompt the court to terminate this partnership even if the court had the power to continue it? We are not informed. No time is set. Will the court choose to supervise the operation of the business and later determine when the time is propitious for a dissolution? The statute confers no such power upon the court.

Paragraph 3 of the Decree, (R. 206, 207) provides that:

> "3. That the division of property as set forth in the findings of fact herein be and the same hereby is confirmed, and in connection therewith the property at what is commonly known as 4580 Wallace Lane, Salt Lake City, Utah, and particularly described in said findings is ordered sold, the proceeds of the sale to be divided equally between the parties, the sale price to be not less than $53,500.00, and subject to the payment of costs and other items mentioned in said findings, and it is further ordered that the parties execute all appropriate documents to effectuate said sale and that either party may purchase the interest of the other at such sale, and that the court retain jurisdiction to effectuate and

carry out the same; that defendant is entitled to live in the home at 4580 Wallace Lane until the same is sold or until defendant secures the possession of the home adjacent to the Colonial Flower business property as hereinafter decreed, whichever occurs first in point of time."

Paragraph 8 of the Decree, (R. 208, 209) provides:

"8. That the property described in the findings of fact herein as the Hillside property shall remain in joint tenacy subject to the mutual control and disposition of the same by the parties and subject to the further order of this court, and in the interim the parties each to pay one-half of the cost of maintenance, including taxes."

Paragraph 9 of the Decree, (R. 209) provides:

"9. That the plaintiff be and he hereby is ordered and directed to pay to the defendant alimony in the sum of $350.00 per month until the Wallace Lane home property is sold or until possession of the home adjacent to the Colonial Flower business property on 9th South Street in Salt Lake City and County, State of Utah, can be obtained for defendant's use, whichever occurs first in point of time; that so long as plaintiff is obligated to pay alimony hereunder defendant is entitled to collect and receive the rents from the Colonial Flower property in the total sum of $300.00 per month, $150.00 of which shall be applied to the payment of said alimony; that upon the contingencies in this paragraph stated, the payment of alimony to the defendant shall cease and terminate; that alimony payments

shall commence to coincide with the next rental payment from the Colonial Flower property and shall be thereafter payable on the monthly anniversary date of such rental payments."

Paragraph 10 of the Decree, (R. 209) provides:

> "10. That the Colonial Flower business property shall remain in joint tenancy and that the rental payments under the present lease shall be divided equally between plaintiff and defendant, provided, however, that as soon as may be done the home adjoining said Colonial Flower business property shall be severed as to title and the home shall become and remain the sole property of the defendant; that the court shall retain jurisdiction to effectuate such transfer and division."

The foregoing provisions of the decree are objectionable for many reasons. The statute, Section 30-3-5, provides:

> "When a decree of divorce is made, the court may make such order in relation to the children, property and parties and the maintenance of the parties and children as may be equitable; * * * such subsequent changes or new orders may be made by the court with respect to * * * the distribution of property as may be reasonable and proper."

We submit that this statute has been disregarded. The statute specifically requires that the Court shall first make such orders in relation to the property as may be equitable. This requirement is a condition precedent to making any "new orders

* * * with respect to * * * the distribution of property", and even when it makes the new orders, they must, of course, be "reasonable and proper."

Every decree should be certain and definite and the statute contemplates finality in the decree unless conditions change which make "new orders" advisable. Our court in *Hamilton* vs. *Hamilton*, 89 Utah 554, 58 P. 2d 11, referring to the Statute 30-3-5, makes this statement:

> "The power of a court to make amendments in particulars authorized by the statute just quoted is not without limits. Thus, in the absence of changed conditions or circumstances a modification of a decree may not be had." (Citing cases.)

Of course, we are not here concerned with "new orders" which change or alter the decree. We are concerned only with the decree itself which should, under the statute, make a definite and final distribution of the property before the Court would have any jurisdiction to make any new order. This the Court has not done.

As stated in the case of *Luithle* vs. *Luithle*, (Wash.) 161 P. 2d 152:

> "It is now accepted as a fundamental proposition that in a divorce action the court has complete jurisdiction of all the property of the parties whether community or separate, and may dispose of it in such manner as is equitable and just under all the circumstances." (citing cases)

The court then quotes from an earlier Washington case:

> "This language (as now contained in Rem. Revised Statutes Section 989) is comprehensive; it is an equitable division of the property rights of the parties that the court is authorized to make. * * * The parties shall bring into court all their property and a complete showing must be made. Each party must lay down before the chancellor all that he or she has, and after an examination into the whole case, he makes an equitable division. * * * The law does not require an equal division of the property, but a 'just and equitable' division, and as no general rule for a just and equitable division can be laid down, but each case must be adjusted according to its own merits and the particular circumstances surrounding it, the court investigates all the circumstances."

In *Holm* vs. *Holm*, (Wash.) 178 P. 2d 725, 729, the court referring to a statute similar to our own, remarks:

> "This section of the statute fixes no arbitrary, nor any hard and fast, rule by which the disposition of property between parties to a divorce action is to be determined; nor are such questions determinable by any rule of law less general than the statutory rule itself. *Kolbe* v. *Kolbe*, 50 Wash. 298, 97 P. 236; *Leonhard* v. *Leonhard*, 147 Wash. 311, 265 P. 1118; *Van Kleffens* v. *Van Kleffens*, 150 Wash. 685, 274 P. 708. It will be noted that the statute simply, but emphatically, requires the court to make a 'just and equitable' disposition of the property, having re-

gard to the merits of the parties, the conditions in which they will be left by the divorce, the particular sources through which the property was acquired, and the burdens imposed upon it for the benefit of the children.

* * * *

"With reference to the power of the court in making disposition of property in divorce cases, it is well established in this state that all of the property of the parties, whether it be community property or separate property, is before the court, for such disposition as is just and equitable under the facts and circumstances of the particular case. *Jeffers* v. *Jeffers*, 199 Wash. 393, 91 P. 2d 1005; *Luithle* v. *Luithle*, 23 Wash. 2d 494, 161 P. 2d 152."

Take the home property at 4580 Wallace Lane, referred to in paragraph 3 of the Decree above quoted, and which is held in joint tenancy (Finding 6, R. 197). Why should the court deprive defendant of her home and compel her to live on 9th South? Has the court the right to require that she accept a home where she does not choose to live? She is the innocent party and should be entitled as a part of the partnership assets to have the home awarded to her. Her claim to the home should be resolved in her favor as against the guilty party, her husband. But the court says it shall be sold and the proceeds divided, but that it cannot be sold for less than $53,500.00. When is it to be sold? No time limit is set. Is the court to call in the parties and say "now is

is the time to sell"? Suppose the parties cannot agree on the price at which the property is to be sold, or that they cannot agree as to the terms of the sale. How then is the sale to be accomplished? Perhaps the court assumes there will be cooperation between the parties, but that time has passed. They want, and should have, no further dealings with one another. The court has made no disposition of this property any more than it made disposition of the partnership business. By its decree it has left these matters "in the air". In other words, it has made no equitable distribution or division.

This home property was not awarded to defendant presumably because a part of the acreage has heretofore been used for growing bulbs sold from Hyland Floral, but if the property is to be sold, it cannot then be beneficial to the Hyland Floral business.

The same is true of the 12.56 acres of hillside property valued at $49,500.00. The court decrees that it shall *continue to be held in joint tenancy* "subject to mutual control and disposition by the parties and subject to the further order of the court, and in the interim the parties each to pay one-half the cost of maintenance, including taxes." This property is to be held in joint tenancy with right of survivorship the same as the Wallace Lane property. It belongs equally to both parties. That is, each has

the same title or interest in the property as the other, and the court specifically perpetuates this joint tenancy. Perpetuating titles as they were at the time the divorce suit was filed and at the time the decree was entered is not an equitable disposition or distribution of the property between the parties. It is no disposition whatever of the property.

The Colonial Flower property, by specific provision of the decree, is also to remain in joint tenancy and the rents equally divided. Again the court obliges the parties to contact or deal with each other, because if there is an equal division of the rentals, the parties cannot avoid contact with one another. This arrangement, that is, the continuation of the joint tenancy and the division of the rents is to be continued until "as soon as may be", the flower shop "shall be severed as to title and the home shall become and remain the sole property of defendant." And then the defendant must accept the home in place of her home on Wallace Lane.

As to the Wallace Lane home, the Hillside property and the Colonial Flower property, the court decrees that notwithstanding the divorce, the titles remain as before the divorce, that is, the parties hold as joint tenants until the sale of the Wallace Lane home or until the further order of the court.

> "An estate held in joint tenancy is but one estate, not a number of estates equal to the number of joint tenants, and for some

purposes the joint tenants are as one person. Each joint tenant is seized of the whole estate; he has an undivided share of the whole estate rather than the whole of an undivided share. Each tenant is said to hold per my et per tout, by the half and by the whole. The shares or interests of joint tenants are presumed to be equal, although the contrary may be shown by proof." 48 C.J.S., 930

"Survivorship is a distinctive characteristic of an estate in joint tenancy. On the death of a joint tenant, the property descends to the survivor or survivors, and at length to the last survivor." 48 C.J.S. 910-911

A joint tenant may sell his interest, thus causing a severance of the joint tenancy and creating a tenancy in common between his co-tenant and the purchaser. 33 C.J.S., 914.

What is to prevent either party from selling his or her interest in these properties pending the "further order of the Court"? Then the other party would have adjustments to make with the new co-tenant. Or suppose one of the parties should die, the survivor would have full ownership of all property held in joint tenancy in addition to the property awarded to him or her by the court, or does the court notwithstanding the divorce reserve jurisdiction to compel some sort of settlement by the survivor with the personal representative of the deceased? There are all these uncertainties as to what may occur, all these probabilities of disagreements

as to the prices at which the joint property shall be sold, and the terms of sale; the time when it shall be sold; its management pending a sale, or pending the "further order of the court," all because the trial court failed to make a definite, certain and complete division of the property as contemplated by the statute.

In the case of *Shaffer* vs. *Shaffer*, (Wash.) 262 P. 2d 763, a certain apartment house and its furnishings were awarded to the plaintiff and defendant as "joint owners or tenants in common." The property was the principal asset of the parties. The court quotes the statute, which provides, among other things, that it shall make "such disposition of the property of the parties, either community or separate, as shall appear just and equitable", and then declares:

> "The trial court has a wide discretion in this regard, but the result of the decree in the case at bar is to leave the Aloha Street property the same as if it were community property of the parties which had not been before the court for disposition. They became tenants in common of any community property not disposed of by the decree. * * * *This was not a performance of the court's statutory duty.*
>
> "The wisdom of the legislative requirement is well illustrated by this case. Because of the inadequacies in the decree, future litigation, including a partition action, between the parties may be necessary. They should not be left with this prospect. They have a right to

have their respective interests in their property after they are divorced *definitely and finally determined in the decree which divorces them.*"

Our Statute, Section 30-3-5, provides:

> "When a decree of divorce is made, the court may make such orders in relation to to * * * property * * * as may be equitable."

True, the statute also provides:

> "Subsequent changes or new orders may be made by the court with respect to * * * the distribution of property as may be reasonable and proper."

But, as before stated, we are not here concerned with "subsequent changes" or "new orders". We are complaining of the decree as entered.

This Court in *Smith* vs. *Smith*, 77 Utah 60, 291 P. 298, declares:

> "The settlement of property rights between the parties is an incident to every decree of divorce where there is any property involved." (Citing cases.)
>
> "In *Roe* vs. *Roe*, 52 Kan. 724, 35 P. 808, 39 Am. St. Rep. 367, it is said that the final judgment in an action granting a divorce settles all property rights of the parties, and is a bar to action afterwards brought by either party to determine the question of alimony, or any property rights which might have been settled by such judgment."

The Court will observe that while by paragraph 9 of the decree it is provided "That so long

as plaintiff is obligated to pay alimony hereunder defendant is entitled to collect and receive the rents from the Colonial Flower property in the total sum of $300.00 per month, $150.00 of which shall be applied to the payment of said alimony", while in paragraph 10 the decree provides "that the rental payments under the present lease shall be divided equally between the plaintiff and defendant" until there is a severance of the home adjoining the Colonial Flower business so as to provide a new home for the defendant. These provisions are inconsistent.

We respectively submit that there has been no equitable distribution or division of the properties to which we have referred; that as to said properties the decree is so incomplete and so indefinite with respect to what is to happen in the future, that it has no finality. The court has attempted to reserve unto himself powers which the statute does not confer upon him and he has in other respects left the divorced parties in a situation which may very easily result in disputes and controversies with respect to the property they are compelled to hold in common both as to the management of it and as to the sale of it, that the decree does not do equity between the parties; that it does not conclude all matters which at a dissolution of their marriage should have been finally and completely settled be-

tween them. The court's wide discretionary power does not authorize it to render a decree that is incomplete and uncertain as to property that is to be disposed of under powers which the court undertakes to reserve unto itself. The ultimate result will be to continue this litigation between these parties interminably with a constant reopening of old wounds, the reliving of old grievances and the resulting emotional disturbance will foredoom any attempt on the part of either to get their lives back on a normal plane.

POINT II.

THE DECREE DOES NOT MAKE AN EQUITABLE DISTRIBUTION OF THE PROPERTY BETWEEN THE PARTIES.

On the date of the trial plaintiff was 55 years of age; defendant was 52 years. The trial court's Memorandum Decision lists the real property accumulated during coverture, the title to all of which is in their joint names with the exception of one tract of 2.56 acres which is in the name of the plaintiff only. However, this tract was purchased from funds obtained from the Hyland Floral business and both parties have a joint interest in it. (R. 80) In fact, plaintiff was not aware that title was in his name only until the trial (R. 80).

The decree provides the Hyland Floral partnership is continued until further order of the court, the plaintiff to receive the sum of $500.00 a month

as a management fee, which he is paid before net partnership earnings are continued. (R. 206) Why should the defendant be required to contribute $250.00 per month towards the salary of the plaintiff in whom she lacks confidence and with whom she no longer wishes to be associated in business. Is this payment to continue until the full duration of the lease, until June 1, 1959 and then for the additional period of four years if the option to renew the lease is exercised?

The cash surrender on the life insurance policies awarded to the defendant amounts to $627.00. She was awarded the New York Life policy, number 21351613, which has a cash surrender value of $2,109.33 (R. 10), however, this latter policy was her separate property in which plaintiff had no interest. Plaintiff was awarded the balance of the insurance policies, including a Commercial Travelers Insurance Company policy, number 22766 (R. 211) (This policy is not included in the list on Rec. 10 as counsel were not aware of its existence until after said list had been compiled.) Total cash surrender value of the policies awarded to the plaintiff is $4,141.15, as compared to $627.00, the cash surrender value of the policies awarded to defendant.

Plaintiff was also awarded the uranium stock and oil lease (R. 207). The evidence showed that while most of the uranium stock had no market

value at the time of trial, the 10,000 shares of Blue Lizzard stock had a value of 11c a share, or $1,100.00 (R. 23, 24). The oil lease was subleased to the California Oil and Development Company, for which the plaintiff receives a rental. The purchase price of this lease was $1,000.00 (R. 87)

It seems that an equitable division of the foregoing property would require that the defendant receive at least half of the value thereof.

The decree provides that the home on Wallace Lane, where the parties have lived the last thirteen years of their married life, is to be sold and the proceeds divided, presumably because it is a ten room home. Defendant testified that she lived only in part of it, the upper rooms being used when she was visited by grandchildren or friends (R. 170). Is it unreasonable for defendant to want to continue to live in this home which has great sentimental value to her? (R. 137) Which is also located in a neighborhood where her friends and relatives live. The decree awards the residence adjacent to the Colonial Floral to the defendant as a home (R. 209, p. 5 Memorandum Decision), now under lease and which is an integral part of the Colonial Floral business. The heat from this residence is supplied by a plant located on the floral premises (R. 179). The residence and the floral business are and have been operated as one unit, and in the interests of busi-

ness efficiency should probably be so operated in the future. Again we say, why should the defendant be required to move into a home or neighborhood which she considers less desirable than where she now is and has spent some of the happiest years of her life? It is true that until the year 1956 the plaintiff used three acres of the Wallace Lane home property in which to plant flowers and bulbs, which was part of the operation of the Hyland Floral. If this property is awarded to the defendant, is there any reason why the use of these three acres for this purpose cannot be continued? Defendant testified that she has no objection so long as the plaintiff assumed any expense connected with said use (R. 136).

We anticipate that plaintiff will contend that it is not economically feasible to liquidate the Hyland Floral business before the expiration of the lease term. If this is so, in equity, why should not this property be awarded to the plaintiff as his sole and separate property and the defendant be awarded the equivalent of her interest in the Hyland Floral from the defendant's share of real estate now held in the joint names of the parties.

This Court has often affirmed the principle that no firm rule can be uniformly applied in all divorce cases; that the distribution of property and awarding of alimony must be determined by the

circumstances of each case. Defendant contends that she should be awarded the home property on Wallace Lane. If necessary for the operation of Hyland Floral, plaintiff to have the right to farm three acres of that property for the duration of the Hyland Floral lease; that she should be awarded one-half of the value of the remaining property, all of which has been accumulated by the joint efforts of the parties during their married life (R. 108). That in addition the plaintiff should be required to pay her alimony in the sum of $350.00 per month in order that she may continue to live according to the station which she had enjoyed before this divorce. She is 52 years of age and her opportunities for remarriage, even if desired, are limited. Her health is not good (R. 106, 108, 114) and with advancing age will probably not improve. The floral business is all she knows (R. 106), which is hard work and beyond her physical ability except perhaps in a supervisory capacity.

There is no evidence to support plaintiff's allegations of cruelty on the part of the defendant. Her conversation with Mickelson, the family friend and financial advisor, was at the suggestion of the boys, both of whom at that time were working in the Hyland Floral business (R. 105). Her conversation with the Bishop of her church was motivated by a desire to effect a reconciliation with the plaintiff.

It is recognized that there is no authority in the laws of this state for administering punitive measures in a divorce judgment, however, the court may consider the relative loyalty or disloyalty of the parties to the marriage vows and their relative guilt or innocence in causing the breakup of the marriage. This Court in *Dahlberg* v. *Dahlberg*, 77 Utah 157, 292 P. 2d 214, said

> "We think the rule contended for by the plaintiff is the correct rule, and is in line with the later cases from this jurisdiction. Of course, the rights and equities of both parties are to be considered, but, whatever doubt there may be concerning the matter, it ought to be resolved against the guilty party whose fault and wrongs and breaches of the marital relation destroyed the home and forced or brought about the separation.

"In *Decker* v. *Decker*, supra, the court said:

> " 'It is also a rule of equity in such cases that the wife shall not be put in a worse condition by reason of her marriage, the dissolution of which has been caused by her husband's willful misconduct. 'Equity and good conscience require that the husband shall not profit by his own wrong, and that restitution shall be made to the wife of the property which she brought to the husband, or a suitable sum in lieu thereof be allowed out of his estate, so far as may be done consistently with the preservation of the rights of each, and also that a fair division shall be made, taking into consideration the relative wants, circumstances and necessities of each, of the property

accumulated by their joint efforts and savings.'

"The court there further stated:

" 'After the equities of the parties in the property are adjusted, then the husband should be caused to pay or not to pay a further sum for support and maintenance in money payments at stated intervals, according to whether or not the wife is equitably entitled to further payment after a consideration of all the facts that enter into a proper solution of that question.'

"In *Van Gordor* v. *Van Gordor*, supra, the court said:

" 'Upon the law of the case, natural justice requires that at least one-half of the property, representing the joint accumulations of husband and wife for a lifetime, should go to the wife, where she obtains a decree of divorce through the fault of the husband. Where, as in this case, the husband and wife have lived together until she is unable to perform hard labor, and have, by their joint labor, management and economy, acquired property sufficient to support them both comfortably when living together, certainly when the wife is forced by the misconduct of the husband to seek separation, she ought to receive sufficient property to support her comfortably, living alone, without reference to her ability to work and contribute to her own support.' "

See also *MacDonald* vs. *MacDonald*, 120 Utah 573, 236 P. 2d 1066, and *Wilson* vs. *Wilson*, 5 Utah 2d 79, 296 P. 2d 977.

Paragraph 11 of the Decree also provides that neither party shall recover costs or attorneys' fees from the other. Again it is recognized that the awarding of these items is discretionary with the court and depend upon the particular circumstances, however, inasmuch as the defendant did not want this divorce and in fact did everything she possibly could to save the marriage, in equity she should be awarded her attorneys' fees and costs.

CONCLUSION

We respectfully submit that the Decree of the trial court should be set aside and: (1) that there be an accounting of the partnership property between the parties and a complete adjudication of their rights in that real estate now held in joint tenancy; (2) that defendant be awarded the home property at 4580 Wallace Lane, together with one-half of the property accumulated by the parties during their marriage, and (3) that she be awarded reasonable alimony and attorneys' fees.

Respectfully submitted,

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Attorneys for Defendant and Appellant.